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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Direct Access to the	)	IB Docket No. 98-192
INTELSAT System	)	File No. 60-SAT-ISP-97
	)	
	)	

To: The Commission

REPLY COMMENTS OF COMSAT CORPORATION

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January 29, 1999

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REPLY COMMENTS OF COMSAT CORPORATION

COMSAT Corporation ("COMSAT") hereby submits its reply and supporting materials in response to comments filed in the above-referenced docket, in which the Commission tentatively proposes to establish "Level 3 direct access" to the International Telecommunications Satellite Organization ("INTELSAT") within the United States.[1]

I. INTRODUCTION AND SUMMARY

Advocates of a Level 3 direct access regime seek to create the misimpression that they are in the forefront of pro-competitive change while COMSAT stubbornly seeks to defend the *status quo*. But, in fact, it is the proposal to implement direct access that is likely to perpetuate the *status quo* by eliminating a leading incentive for the full privatization of INTELSAT. COMSAT, on the other hand, has proposed a comprehensive reform of

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[1] Direct Access to the INTELSAT System, IB Docket No. 98-192, File No. 60-SAT-ISP-97, FCC 98-280 (rel. Oct. 28, 1998) (Notice of Proposed Rulemaking) ("*Notice*"). The *Notice* envisions that U.S. customers would contract directly with INTELSAT to obtain space segment capacity—but that COMSAT would remain liable for satisfying U.S. investment and

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INTELSAT's intergovernmental structure which would encompass the main objectives of direct access by ending the exclusive role of the government-designated "Signatories" to INTELSAT, as well as the privileges and immunities accorded to the IGO and its Signatories. Thus, out of all the participants in this proceeding, COMSAT is clearly the most committed advocate of, and proven instrument for, promoting the principal U.S. policy goal for international satellite reform: complete INTELSAT privatization.

COMSAT was the first to recognize that INTELSAT's cumbersome intergovernmental structure is not appropriate in today's competitive marketplace—and that only a fundamental restructuring of the organization can ensure its ability to be a viable competitor in the markets of the future. Accordingly, COMSAT strongly supported the initial privatization of a portion of INTELSAT through the spin-off of a quarter of the IGO's assets to New Skies Satellites, NV. And COMSAT continues to vigorously advocate the completion of this process, through privatization of INTELSAT's remaining assets.

Direct access would do nothing to advance the reforms advocated by the U.S. government for a pro-competitive restructuring of INTELSAT and elimination of the treaty-based aspects of INTELSAT's intergovernmental status. To the contrary, as COMSAT explained in its initial comments in this proceeding, adoption of a Level 3 direct access regulatory regime now—before INTELSAT privatization is complete—would allow a tax-exempt and unregulatable intergovernmental organization to market satellite services directly to U.S. customers. And perversely, it would have the effect of reinforcing the existing

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other treaty obligations to the intergovernmental organization ("IGO").

INTELSAT structure (by expanding its U.S. distribution outlets) at the very time that the United States is seeking to dismantle that structure through privatization.

Allowing INTELSAT to contract directly with U.S. carriers and broadcasters is a prize that should be awarded only in exchange for rapid and full privatization of the IGO. Since COMSAT first began advocating full privatization, other Signatories have sought to curtail the process by proposing lesser reforms; indeed, some have expressly sought to promote direct access "reform" in the United States as a means of achieving their competitive objectives without having to relinquish INTELSAT's intergovernmental status. Thus, adoption of the Commission's direct access proposal would clearly tend to *impede* privatization (by playing into the hands of these foreign entities), while also allowing INTELSAT to keep and use its immunity from regulation and taxation as an "artificial" competitive advantage in the U.S. marketplace.[2]

In fact, privatization negotiations already are being complicated by the agency's suggestion that foreign Signatories may soon be able to obtain what they most want—direct access to the U.S. marketplace to provide INTELSAT's services without further privatization. At the first INTELSAT Board of Governors meeting after the release of the FCC's *Notice*, several influential Signatories again suggested that expanded U.S. access rather than privatization might be a preferable option for commercializing INTELSAT. Thus, the mere existence of this rulemaking has already provided substantial aid and comfort to those seeking alternatives to the U.S. goal of full privatization.

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[2] This advantage is artificial in the sense that it is not derived from natural marketplace efficiencies.

Moreover, even leaving aside the potential impact on privatization, COMSAT has demonstrated that any user benefits claimed for Level 3 direct access would be far outweighed by the negative consequences. In particular, COMSAT's initial submission showed that:

- The FCC already has determined that effective facilities-based competition exists for the vast majority of COMSAT's traffic—thus proving that direct access is not needed to promote competition.

- COMSAT's so-called "mark-up" of 68% over the average INTELSAT Utilization Charge ("IUC") is not even a meaningful number, much less evidence of "monopoly" prices.

- COMSAT's IUC-related return on its INTELSAT investment is below the levels expected in the telecommunications marketplace—so claims that an IUC-based return alone would adequately compensate COMSAT for the loss of its retail business under Level 3 direct access are completely unfounded.

- Implementation of direct access in various foreign countries is not relevant to the circumstances that exist in the United States. Other nations have adopted direct access to introduce competition to vertically and horizontally integrated national carriers—precisely the kind of facilities-based competition that has been available to users in the United States for years.

- Even if direct access could produce some cost savings for U.S. carriers, no carrier made a serious effort to quantify those savings or a firm commitment to pass them along to consumers, despite the specific request in the *Notice* that they do so.

In calling for a Level 3 direct access regulatory regime, U.S. and foreign carriers are urging the Commission to violate its statutory duties, trample on a company's constitutional rights, and abandon 37 years of administrative practice. Certainly no commenter has submitted sufficient facts or argument to counter COMSAT's exhaustive showing that the Satellite Act bars the FCC from adopting a Level 3 direct access regime. The text, structure, and history of the statute demonstrate that lawmakers explicitly and intentionally granted COMSAT the exclusive right to provide INTELSAT-based services to U.S. users.

Nor have commenters addressed COMSAT's showing that implementation of Level 3 direct access would obligate the U.S. government to compensate the corporation for the taking of property and for breaching the regulatory contract between COMSAT and the U.S. government. Rather, they have only added fuel to the constitutional fire by calling for additional confiscatory measures that would create even clearer takings liability—*i.e.*, a Level 4 direct access regime, "fresh look" treatment of existing contracts between COMSAT and U.S. carriers, and the so-called "portability" concept that would force COMSAT to surrender INTELSAT capacity that it owns.

The Commission should reject these unsolicited requests. The agency has correctly determined that it lacks statutory authority to implement Level 4 direct access. As for "fresh look" and "portability," the FCC as a matter of procedure is barred from considering either concept in this proceeding. Even if it were not, there is no factual or legal basis which would support such drastic measures in the circumstances here.

In sum, the Commission not only lacks the legal authority to impose a Level 3 direct access regime but it must confront the strong economic and policy reasons weighing heavily against the proposal—including competitive harms and unnecessary risks to INTELSAT privatization. COMSAT respectfully submits that the FCC's energy and scarce resources would be better utilized if they were devoted to promoting the rapid and comprehensive privatization of INTELSAT.

II. COMMENTERS HAVE NOT REFUTED COMSAT'S ANALYSIS THAT THE SATELLITE ACT BARS THE COMMISSION FROM ORDERING DIRECT ACCESS

Commenters in this proceeding have made little or no effort to undertake a serious statutory analysis of the Commission's authority under the Communications Satellite Act of 1962 ("Satellite Act"). Instead, they mostly parrot the erroneous conclusion set forth in the *Notice* that the absence of words such as "exclusive" or "sole" in the statute necessarily affords the FCC power to implement its proposal.[3]

COMSAT already has amply refuted that contention by documenting that the plain meaning of the Satellite Act—viewed in the light of its overall statutory structure, history, and background—bars the agency from eliminating the corporation's exclusive franchise over the provision of INTELSAT-based services in the United States. To summarize briefly:

- Lawmakers in 1962 intentionally created a new, independent satellite entity with an exclusive franchise to provide services via the unbuilt system precisely because lawmakers wished to preclude the existing wireline carriers—principally the monopoly retail carrier, AT&T—from controlling

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[3] *See, e.g.,* Comments of ABC, Inc., CBS Corporation, National Broadcasting Company, Inc., and Turner Broadcasting System, Inc., IB Docket No. 98-192, at 14-16 (filed Dec. 22, 1998) ("Network Comments"); Comments of AT&T Corporation, IB Docket No. 98-192, at 2-5 (filed Dec. 22, 1998) ("AT&T Comments"); Comments of BT North America, IB Docket No. 98-192, at 14-16 (filed Dec. 22, 1998) ("BT North America Comments"); Comments of Cable & Wireless 6-9 (filed Dec. 22, 1998) ("Cable & Wireless Comments"); Comments of Ellipso, Inc., IB Docket No. 98-192, at 5-6 (filed Dec. 22, 1998) ("Ellipso Comments"); Comments of GE American Communications, Inc., IB Docket No. 98-192, at 3-7 (filed Dec. 22, 1998) ("GE Americom Comments"); Comments of Globecast North America Inc., IB Docket No. 98-192, at 2 (filed Dec. 22, 1998) ("Globecast Comments"); Comments of IT&E Overseas, Inc., IB Docket No. 98-192, at 3 (filed Dec. 22, 1998) ("IT&E Comments"); Comments of Loral Space & Communications Ltd., IB Docket No. 98-192, at 1-2 (filed Dec. 22, 1998) ("Loral Comments"); Comments of MCI WorldCom, Inc., IB Docket No. 98-192, at 3-7 (filed Dec. 22, 1998) ("MCI WorldCom Comments"); Comments of Sprint Communications Company, L.P., IB Docket No. 98-192, at 3-5 (filed Dec. 22, 1998) ("Sprint Comments").

the use of the system. Indeed, all of the competing proposals for the new U.S. satellite entity would have conferred exclusivity on the provision of services via the new system.[4]

- The Act therefore explicitly states in its opening section that "United States participation in the global system shall be in the form of *a* private corporation," and goes on to explicitly enumerate the powers and obligations of that corporation—COMSAT.[5]

- Among those powers, the Act explicitly grants only COMSAT the right to "furnish, for hire, channels of communication" via the new system to communications common carriers and other users. A Commission order allowing other entities to furnish such channels under Level 3 direct access

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[4] *See* Comments of COMSAT Corporation , IB Docket No. 98-192, at I.C, II.B.4 & Appendix 1, Lawrence W. Secrest, III, William B. Baker, and Rosemary C. Harold of Wiley, Rein & Fielding, *The FCC Lacks the Statutory Authority to Permit Level 3 Direct Access to the INTELSAT System* (Dec. 22, 1998), at 42 (filed Dec. 22, 1998) ("COMSAT Comments").

[5] *See* COMSAT Comments at II.A.1 & Appendix 1 at 44. Several commenters repeat the Commission's erroneous contention that the term "participation" in Section 102 of the Act necessarily implies exclusivity as to ownership of the system but not to the furnishing of service. *See Notice* at ¶ 23; *see, e.g.*, MCI WorldCom Comments at 3-4. This strained construction of the term is not even consistent with the FCC's own use of the term—as amply illustrated in the so-called *Foreign Participation Order*. *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891 (1997) (in paragraphs 2, 29, 34, 45, 57, 62, 117, 125, 133, 134, 185, 207, 209 and footnotes 38, 318, 488 and 693, meaning of term "participation" includes provision of service as well as ownership of facilities).

BT North America's contention that "participation" should be construed to mean only representation of "U.S. *government*" interests—without exclusivity as to provision of service or ownership—is contrived and contrary to the legislative history. BT North America Comments at 15. If the term meant nothing more than what BT North America proposes, Congress would have had no reason to establish a private corporation at all; a government agency could have been quickly and easily handed the task. But lawmakers specifically considered and resoundingly rejected the idea of establishing a new government entity for the tasks they envisioned. They did so largely because those tasks included financing the system and providing commercial services—which Congress doubted that a government agency could accomplish swiftly or well. *See* COMSAT Comments at I.A & Appendix 1 at 38. Lawmakers also considered it more appropriate to rely, in keeping with traditional U.S. practices, on private enterprise to provide services on a commercial basis.

would render this grant superfluous—a reading contrary to Supreme Court precedent on statutory interpretation.[6]

- The Act explicitly provides for competition in certain aspects of the global system's operations, such as the provision of earth station services, but not in the furnishing of satellite space segment capacity or ownership and operation of the system. Lawmakers' inclusion of specific directives for competition in specified aspects of the new global system necessarily establishes the fact that the corporation has exclusive authority to act in those areas in which the statute speaks of COMSAT alone. Any other reading would render the latter provisions pointless—again, a reading contrary to the canons of statutory construction.[7]

- Immediately following the declaration that U.S. participation is to be in the form of "a private corporation, subject to appropriate governmental regulation," the Act declares that all users are to have "nondiscriminatory access" to the system—and the statute then goes on, in reciprocal provisions, to make the Commission the "appropriate governmental regulator" of that mandate and COMSAT the entity so regulated. Subjecting COMSAT alone to common carriage obligations in its provision of satellite capacity would be meaningless if the law allowed INTELSAT to compete directly with COMSAT while subject to no FCC common carrier regulation, as would occur under a Level 3 direct access regime.[8]

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[6] *See* 47 U.S.C. § 735(a)(2); COMSAT Comments at II.A.1 & Appendix 1 at 44. *See also Astoria Federal Savings & Loan Association v. Solimino,* 501 U.S. 104, 112 (1991) ("of course we construe statutes, where possible so as to avoid rendering superfluous any parts thereof"); *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998) ("A cardinal principle of interpretation requires us to construe a statute 'so that no provision is rendered inoperative or superfluous, void or insignificant.'") (citation omitted)); *See also C.F. Comm. Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997).

[7] *See* 47 U.S.C. § 721(c)(7); COMSAT Comments at II.A.2 & Appendix 1 at 51.

[8] *See* 47 U.S.C. § 701(c) (statement of general "nondiscriminatory access" policy), § 721 (ordering FCC regulation to insure "nondiscriminatory use" and "equitable access" to both the satellite system *and* earth stations), § 741 (imposing "common carrier" obligations on COMSAT); *see also* COMSAT Comments at I.D.3 & Appendix 1 at 23. The claim of several commenters that the first of these statutory provisions now requires the FCC to permit direct access, *see, e.g.*, AT&T Comments at 2-3, is contrary to both the plain meaning and the statutory structure of the Act for all the reasons set forth in the text.

The suggestion of BT North America that Sections 721 and 741 provide for alternative

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- The Act explicitly establishes safeguards to shield COMSAT from dominance or control by the so-called "retail" carriers who were to be its customers. This statutory scheme derived directly from lawmakers' rejection of the "carrier consortium" model that AT&T and others had advocated—a congressional choice that Level 3 direct access would effectively reverse. Indeed, the Act's restraints on carrier ownership and board representation would make no sense if the carriers could simply bypass COMSAT in obtaining service from the global system.[9]

- The Act does not, contrary to many commenters' assumptions, presuppose the establishment of INTELSAT.[10] Rather, it was deliberately crafted to allow, as an alternative, COMSAT alone to own, operate, and provide service via the unbuilt system.[11] A reading of the Act to allow for Level 3 direct access in the latter context would be nonsensical.[12]

- Consistent references in the legislative history to the U.S. participant as a "monopoly"—regardless of whether the entity were a carrier consortium, a new government agency, or COMSAT—would make no sense if non-exclusive access as envisioned under Level 3 were permissible. All such remarks were based on the understanding that the owner/operator of the world's first satellite system would have a monopoly in the sense that it

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means of access to capacity, BT North America Comments at 13, is similarly flawed. BT's contention depends upon the notion that COMSAT is nothing more than another carrier under the statutory scheme—a proposition that is flatly wrong, as a contextual reading of the Act demonstrates. *Cf.* AT&T Comments at 3. As COMSAT already has explained, the statute consistently distinguishes between "the corporation" (*i.e.*, COMSAT) on the one hand and "authorized carriers" on the other. *See* COMSAT Comments, Appendix 1 at 51 (noting, for example, the distinction in 47 U.S.C. § 721(c)(7), which states that the FCC may issue earth station licenses "either to the corporation or to one or more authorized carriers or to the corporation and one or more carriers jointly"). The two provisions that BT North America cites cannot be construed to allow for alternative means of access without doing violence to the plain meaning of the other sections of the Act.

9 COMSAT Comments at II.A.3 & Appendix 1 at 51.

10 *See, e.g.*, Loral Comments at 1-2; Sprint Comments at 3-4.

11 47 U.S.C. § 735(a)(1); *see also* COMSAT Comments at II.A.5.

12 COMSAT Comments at II.A.5 & Appendix 1 at 66.

would be the sole seller of satellite capacity, at least until the emergence of rival "separate" satellite systems that the Act does envision.[13]

- Consistent references in the legislative history to the U.S. participant as a "carrier's carrier" also would make no sense if the statute allowed for multiple carriers to offer INTELSAT services under a Level 3 direct access regime. There would have been no reason or need for Congress to have focused on this role if the carriers could simply bypass COMSAT in obtaining capacity; lawmakers did so precisely because they wanted to ensure that no carrier would be denied equal access to what became the INTELSAT system. Carriers obtaining capacity directly from INTELSAT could thwart the pro-competitive role assigned to COMSAT.[14]

- The Satellite Act's grant of an exclusive service franchise on COMSAT is further demonstrated by the 37-year history in which this right was understood to be the law and was the practice. Contrary to the claims of some commenters, the statutory basis for COMSAT's rights has been recognized in FCC decisions issued most closely in time with the Act, as well as by court rulings over the years.[15]

- Congress purposely modeled the 1978 Inmarsat Act on the 1962 Satellite Act—and lawmakers understood that in giving COMSAT an exclusive right to offer Inmarsat-based services, they were doing no more than they had done in granting COMSAT exclusivity over INTELSAT services. The slight differences in wording between the two pieces of legislation reflect the fact that the drafters of the Inmarsat Act benefited from the model supplied through years of experience with the Satellite Act and the creation, deployment, and operation of the INTELSAT system. The Inmarsat Act's legislative history bolsters this point; no one at the time contended that in granting COMSAT exclusive access to Inmarsat, lawmakers were giving

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[13] *See* COMSAT Comments at II.B.2 & Appendix 1 at 17. Yet lawmakers also understood that this so-called monopoly did not extend to all international facilities-based services in 1962—copper transoceanic cables predated the satellite system, and concern about AT&T's dominance over that mode of transmission was a major spur to enactment of the Satellite Act. *See* COMSAT Comments at I.C & Appendix 1 at 31.

[14] *See* COMSAT Comments at II.B.3 & Appendix 1 at 27.

[15] *See* COMSAT Comments at II.C & Appendix 1 at 67.

COMSAT a greater degree of exclusivity than it already had with respect to INTELSAT.[16]

Other than the contentions already rebutted in the foregoing review, commenters in this proceeding offered few new statutory arguments for direct access. While MCI WorldCom attempts to make something out of the Commission's 1970 "transiting" decision, that case itself plainly states that a reading of the statute as a whole left "no doubt that the [A]ct provides that [COMSAT] is the chosen instrument to provide space segment facilities to licensees of earth stations in the United States."[17] Others suggest that the FCC's rate-setting authority might somehow come into play, but the provision to which they point is irrelevant with respect to direct access.[18]

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[16] *See* COMSAT Comments at II.D & Appendix 1 at 76-87.

[17] COMSAT Comments, Appendix 1 at 71 (quoting *Establishment of Regulatory Policies Relating to the Authorization Under Section 214 of the Communications Act of 1934 of Satellite Facilities for the Handling of Transiting Traffic,* 23 F.C.C.2d 9, 12 (1970)). *Contra* MCI WorldCom Comments at 5-6. While MCI WorldCom contends that this decision has implications for Level 3 direct access, they are difficult to discern in a decision that simply holds that COMSAT's exclusive INTELSAT service franchise is limited to areas within the geographic boundaries of the United States.

[18] *See, e.g.,* Loral Comments at 2 (quoting 47 U.S.C. § 721(c)(5), which directs the FCC to regulate so as to "insure that any economies made possible by a communications satellite system are appropriately reflected in rates for public communication services"). Certain commenters seem to assume that COMSAT is no different under the Act than any other carrier or authorized user (but see *supra* note 8 and accompanying text) and that therefore this provision means that all such entities are entitled to service at IUC rates. To the contrary, this provision was designed to guarantee that the anticipated technological benefits of satellite transmission—*i.e.*, distance insensitivity to costs—would be spread to ameliorate the then-higher unit cost of undersea cable transmission. *See, e.g., Licensing of Facilities for Overseas Communications*, 62 F.C.C.2d 451, 452, 455 (noting that Section 721(c)(5) partially governs FCC authorizations for cable and satellite facilities, with the obligation to ensure that "the economies available from each advance in technology be reflected in charges for service"). Furthermore, Loral's contention would be nonsensical if COMSAT, rather than INTELSAT,

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Two foreign-owned commenters also contend that the Satellite Act would allow for Level 4 direct access.[19] But the Commission and most commenters recognize that the Satellite Act does not allow for COMSAT's investment stake to be taken by government fiat without just compensation—and that obvious constitutional issues would arise as a result of any such effort.[20] Other nations do not place the same importance on property rights as does the United States, embodied in the Fifth Amendment to our Constitution. Moreover, all of the points reviewed above with respect to Level 3 direct access would apply with equal, if not greater, force to Level 4 direct access. Neither the text nor the design of the Satellite Act allows the Commission to expropriate COMSAT's explicit ownership rights in the INTELSAT system, and the statutory history of the legislation shows that Congress decisively rejected the idea of direct carrier ownership in the first global system.[21]

In short, no commenter has provided the Commission with any credible legal argument or factual basis to rebut COMSAT's extensively researched statutory analysis. The language, structure, and context of the Satellite Act make it unmistakably clear that Congress intended to give COMSAT the exclusive franchise to provide INTELSAT services in the United States. Only Congress, therefore, is empowered to alter this statutory scheme.

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had served as the organizational vehicle for the global system. *See supra* notes 10-12 and accompanying text.

[19] BT North America Comments at 8-16; Cable & Wireless Comments at 10-11.

[20] *Notice* at ¶ 19; *see, e.g.,* Globecast Comments at 2; Loral Comments at 1-2.

[21] COMSAT Comments at I.D.2 & Appendix 1 at 31. As discussed at length in COMSAT's initial submission, lawmakers actively considered and eventually rejected proposals for a carrier-owned consortium to own, operate, and provide service via the unbuilt
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III. COMMENTERS HAVE NOT REFUTED COMSAT'S SHOWING THAT THE U.S. GOVERNMENT WOULD BE OBLIGATED TO COMPENSATE COMSAT FOR THE TAKING OF ITS PROPERTY

None of the comments adequately addressed COMSAT's showing that mandating Level 3 direct access would obligate the U.S. government to compensate COMSAT for the taking of property and for breaching the regulatory contract between COMSAT and the government.[22] Certainly none effectively rebutted COMSAT's detailed demonstration of the risks such action would pose for the U.S. Treasury. The few that discussed these issues at all did so in passing, and generally reiterated the *Notice's* flawed analysis, which COMSAT and Mr. Sidak already have debunked.[23]

AT&T's superficial discussion similarly repeats the FCC's mistakes in mischaracterizing the significance of *United States v. Winstar Corporation* and *The Binghampton Bridge*.[24] As discussed at greater length in the accompanying opinion of law provided by J. Gregory Sidak, dated January 29, 1999 ("Second Sidak Letter"), AT&T's erroneous assumption that these are the only cases bearing on the regulatory contract or related

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system. *See, e.g.,* COMSAT Comments, Appendix 1 at 34-37.

[22] *See* AT&T Comments at 5-11; Cable & Wireless Comments at 9-10; GE Americom Comments at 7; IT&E Comments at 4; Loral Comments at 2; MCI WorldCom Comments at 7-9; Network Comments at 17-18; Comments of PanAmSat Corporation, IB Docket No. 98-192, at 4-5 (filed Dec. 22, 1998) ("PanAmSat Comments"); Sprint Comments at 6.

[23] *See* COMSAT Comments at III & Appendix 2, J. Gregory Sidak, F.K. Weyerhauser Fellow in Law and Economics, American Enterprise Institute for Public Policy Research, *Opinion of Law Concerning the Constitutionality of the Commission's Proposed and Direct Access to Space Segment Capacity on the INTELSAT System* (Dec. 22, 1998).

[24] *United States v. Winstar Corp.*, 518 U.S. 839 (1996); *The Binghampton Bridge*, 70 U.S. 51 (1865).

takings issues ignores a long line of decisions enforcing such contracts against the government.[25] AT&T also ignores the economic necessity for the government to keep its promises.[26]

AT&T blurs the distinctions between *per se* takings that result from physical invasions and "regulatory takings" caused by the government's imposition of noninvasive burdens on the use of one's property.[27] The remainder of AT&T's takings analysis is riddled with errors of law, fact, economics, and logic.[28] AT&T has said nothing to disprove that Level 3 would cause an involuntary physical invasion of COMSAT's property, deprive COMSAT of the value of its property to constitute a regulatory taking, and breach the government's regulatory contract with COMSAT.[29]

Some commenters made suggestions that would create additional, even clearer takings liability. As noted above, two commenters proposed that the FCC should mandate "Level 4"

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25 Second Sidak Letter at 3.

26 *Id.* at 5.

27 *Id.* at 3.

28 *Id.* at 4.

29 COMSAT notes that, when it serves AT&T's purposes, that company recognizes and vigorously defends the value of exclusive rights to control access over the transmission facilities it owns, and even objects to a government requirement for non-discriminatory access to those facilities by competitors—unlike COMSAT, which offers equal access to its facilities to all comers, including competitors. *See, e.g.,* Seth Schiesel, *At Last a New Strategy for AT&T*, N.Y. Times, Jan. 17, 1999, at Sec. 3, p.1, c.3; Rebecca Blumenstein and Stephanie N. Mehta, *AT&T Says It Shouldn't Have to Grant Internet Access Via Upgraded Cable Lines*, Wall St. J., Nov. 17, 1998, at B6 (discussing AT&T's complaints about being "forced to give competitors equal access [to the facilities] it will spend billions to create" under its proposed deal with TCI).

direct access.[30] A number of other commenting parties asked the agency to impose so-called "fresh look" and "portability" requirements.[31] These proposals should be rejected on a wide variety of grounds, including the fact that they would impose very large financial liabilities on the U.S. government.

As the Second Sidak Letter shows, Level 4 direct access would result in a physical invasion of COMSAT's private property in the INTELSAT system—as well as a regulatory taking—for all of the same reasons that apply with respect to Level 3 direct access.[32] Thus, Level 4 would effect the same uncompensated taking of COMSAT's property as would Level 3 direct access.[33]

A taking also would result if the Commission were to grant the requests by certain commenters for "fresh look" and "portability." For the FCC to allow COMSAT's customers unilaterally to abrogate their contracts with COMSAT for the supply of space segment capacity, and also avoid termination liability, would be an indisputable taking of COMSAT's property rights in its contracts.[34] The Supreme Court has recognized that "[v]alid contracts

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30 BT North America Comments at 9-11; Cable & Wireless Comments at 11.

31 *See* AT&T Comments at 13-15; Comments of ICG Satellite Services, IB Docket No. 98-192, at 5-6 (filed Dec. 22, 1998) ("ICG Comments"); Loral Comments at 8-9; MCI WorldCom Comments at 25-30; PanAmSat Comments at 9-10; Sprint Comments at 10-13. *See also infra* Section VIII, which addresses the fact that neither fresh look nor portability are properly raised as issues in this proceeding—and that even if they were, the legal tests for imposing these extreme measures are not satisfied in any case.

32 *See* Second Sidak Letter at 6-7.

33 *See* COMSAT Comments at III.C & Appendix 2 at 23-27.

34 *See* Second Sidak Letter at 7-9.

are property."[35] Accordingly, the Constitution bars government action that would "nullify express terms of [a] company's contractual obligations."[36]

There is no basis for providing such a gratuitous windfall to large and sophisticated telecommunications firms—such as AT&T, MCI WorldCom, and Sprint. There is no showing of unequal bargaining power between COMSAT and such companies.[37] Indeed, the FCC has confirmed, in the *Non-Dominance Order*, that COMSAT lacks market power with respect to the vast majority of its traffic.[38]

A main purpose of contract law is to guard against opportunistic behavior after one party to a contract already has made certain irreversible investments.[39] By abrogating COMSAT's contracts with its customers—and nullifying their express contractual obligations to COMSAT—the FCC's imposition of fresh look would confiscate COMSAT's property interest in its contracts and thus expose the U.S. Treasury to claims for compensation under the takings clause.

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35 *Lynch v. United States*, 292 U.S. 571, 579 (1934).

36 *Allied Structured Steel v. Spannaus*, 438 U.S. 234, 247 (1978).

37 If anything, the substantial differences between the contracts COMSAT negotiated with AT&T and MCI in 1987-88 and those it negotiated with AT&T, MCI, and Sprint in 1993-94 indicate an increase in the bargaining power of the *carriers*. The 1993-94 contracts gave the carriers much lower prices than the previous contracts in exchange for much smaller traffic commitments. Moreover, the 1993-94 agreements substantially *reduced* the termination liabilities that the carriers would pay for canceling circuits.

38 *Reclassification of COMSAT as a Non-Dominant Carrier*, 13 FCC Rcd 14083, 14147-48 (1998) ("*Non-Dominance Order*").

39 Second Sidak Letter at 8.

"Portability" is plagued by even clearer constitutional infirmities.[40] Presumably, portability would mean that COMSAT would be forced to surrender INTELSAT capacity which it has already reserved for its use under long-term "take or pay" contractual commitments to INTELSAT. Thus, by government order, COMSAT's INTELSAT capacity would be physically occupied by another party—a *per se* taking.[41] As Mr. Sidak points out, "COMSAT's capacity on the INTELSAT system can be deemed to be "portable" only in the same sense that a person's personal property is portable after a thief has absconded with it."[42]

IV. COMMENTERS HAVE NOT REFUTED COMSAT'S SHOWING THAT ALLOWING DIRECT ENTRY OF INTELSAT INTO THE U.S. MARKETPLACE WOULD PUT PRIVATIZATION AT RISK

Both the Administration's and Congress' primary policy goal for international satellite reform in 1999 is the privatization of INTELSAT.[43] The Executive Branch recognizes that

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[40] *Id.*

[41] As the Second Sidak Letter makes clear, under INTELSAT's governing documents, the right to control the use of INTELSAT's circuits to and from the United States belongs to COMSAT, the U.S. Signatory. Accordingly, before INTELSAT can provide capacity directly to a non-Signatory, INTELSAT must first obtain COMSAT's consent to use the circuits that COMSAT lawfully controls. The Commission's order of Level 3 direct access would have the effect of mandating COMSAT's "consent" to providing the direct access customer with (presumably additional INTELSAT) capacity that must, as a matter of law, belong to COMSAT. Thus, Commission imposition of Level 3 direct access would be analogous to the government coercing a tenant to lease a second apartment from X and immediately sublease it to Y. Portability, which would require COMSAT to surrender capacity it has bought, contracted for, and relied upon, is akin to the government requiring the tenant to allow Y to move into its already rented home. *Id.*

[42] *Id.*

[43] *See, e.g.,* News Release of the Office of Sen. Conrad Burns, *Burns Prepares Satellite Bill: Burns Hopes to Introduce Privatization Legislation Late Next Week* (rel. Jan. 22, 1999)

(Continued...)

restructuring the IGO would benefit the competitiveness of the international facilities-based telecommunications marketplace in a more effective and less regulatory manner than could any new—and temporary—direct access scheme.[44] The *Notice* therefore properly called for comment on the adverse impact that Level 3 direct access might have on U.S. goals for privatizing INTELSAT.[45] The record now before the Commission contains an abundance of evidence that direct access in the United States likely would skew, slow, or even derail the ongoing privatization drive short of a pro-competitive completion.[46] Those few commenters who contended otherwise provided no support for their assertions.[47]

(Continued)
(visited Jan. 28, 1999) (available at <http://www.senate.gov/~burns/p990122b.htm>); *Burns Circulates Draft Legislation Calling for Intelsat Privatization,* Telecom. Rpt., Jan. 25, 1999, at 39 (noting that legislation calls for "direct access" to occur "only upon full privatization").

[44] *See* COMSAT Comments at IV.B.3 (*quoting* National Telecommunications and Information Administration). With privatization, COMSAT's exclusive Signatory role would, of course, disappear—along with any limited privileges and immunities alleged to be derived from it.

[45] *Notice* at ¶ 59.

[46] *See* COMSAT Comments at IV.A.1, B & Appendix 3, Professor Jerry L. Green and Professor Hendrik S. Houthakker of Harvard University; Johannes P. Pfeifenberger of The Brattle Group, *An Economic Assessment of the Risks and Benefits of Direct Access to INTELSAT in the United States* (Dec. 21, 1998), at 17; Comments of Lockheed Martin Corporation, IB Docket No. 98-192, at 13-15 (filed Dec. 22, 1998) ("Lockheed Martin Comments"); Comments of Columbia Communications Corporation, IB Docket No. 98-192, at 3, 8-9 (filed Dec. 22, 1998) ("Columbia Comments").

[47] *See* MCI WorldCom Comments at 23-24; GE Americom Comments at 12-14; Ellipso Comments at 12-13.

A. Evidence before the Commission Demonstrates that Permitting Level 3 Direct Access Now Will Eliminate a Leading Incentive for INTELSAT's Foreign Signatories to Support Full Privatization

COMSAT already has presented—and The Brattle Group has detailed—many of the economic and policy reasons why the Commission's proposal presents a real threat to privatization. One of COMSAT's satellite competitors put it succinctly: "[H]anding over the valuable prize of U.S. market access without reform of INTELSAT could be a powerful disincentive to the pro-competitive privatization of the organization—both for INTELSAT and for many of its key participating Signatories."[48]

The reason for this concern is not difficult to comprehend. Currently, no Signatories other than COMSAT may participate in the U.S. marketplace as direct providers of INTELSAT capacity, but a number of these foreign entities dearly want to compete directly for American traffic using INTELSAT to provide end-to-end service. If the FCC were to give foreign Signatories that opportunity now, their incentive to proceed with further privatization would be substantially diminished.[49] Instead, certain Signatories would be more likely to want to retain the intergovernmental structure of INTELSAT, and to pursue a system of non-exclusive distributors worldwide as the means of responding to growing global competition.[50]

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[48] *See* Columbia Comments at 3; *see also* Lockheed Martin Comments at 14-15.

[49] *See* COMSAT Comments at IV.B.3; *see also* Columbia Comments at 3 (If direct access is permitted "the United States will have substantially less leverage with which to influence the privatization negotiations taking place within INTELSAT.").

[50] *See, e.g., France: Change in French Govt. Won't Alter Satellite Policies, Officials Say*, Comm. Daily, June 16, 1997 (noting that "France has resisted U.S. pressure to make large portion of ISOs' future privatized operations publicly traded").

The debate within INTELSAT might shift from how to proceed with privatization to considering whether expanded direct access would be a preferable option.

The Commission should not undermine the Administration's policy objective by throwing direct access as a monkey wrench into the privatization negotiations. Evidence from recent INTELSAT Board of Governors meetings supports the validity of this concern. The participants were well aware of the FCC's proposal to allow INTELSAT direct access to the U.S. marketplace, and the effects were immediate. The Board was unable in December 1998 to narrow down the options for reform as COMSAT has urged; instead, it continues to discuss four alternatives—two of which would essentially retain the current IGO structure without major change.[51] Indeed, several foreign Signatories expressly raised the issue of direct access in the United States as an example of how to improve INTELSAT's competitiveness under the existing INTELSAT Agreements as opposed to pursuing privatization.

Thus, merely by issuing the *Notice* in this proceeding, the Commission already has complicated the privatization negotiations, which may delay formation of a final plan. The *Notice* has invigorated the opponents of a full, pro-competitive privatization by suggesting that foreign Signatories may obtain direct entry into the U.S. marketplace via INTELSAT without significant reform of the IGO. Actual adoption of the agency's tentative proposal for Level 3 direct access, therefore, would most certainly undermine the United States' primary policy objective for reforming INTELSAT.

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[51] *See, e.g., COMSAT Advances Campaign for Major INTELSAT Privatization*, Satellite News, Jan. 11, 1999; *Comsat Backs Privatization Options, Wants Intelsat Commitment by Fall*, Telecom. Rpt, Jan. 11, 1999.

B. Self-Serving Comments by U.S. Carriers Do Not Provide Evidence to Rebut COMSAT's Showing that These Parties Have Economic Incentives to Advance Direct Access Rather Than Privatization

Direct access prior to privatization could also inject U.S. facilities-based competitors into the process and produce a less than optimal outcome from a competition standpoint. COMSAT has submitted a detailed analysis by The Brattle Group which demonstrates that Level 3 direct access would give the large U.S. carriers substantial economic incentives to skew privatization—and sufficient clout with INTELSAT and foreign Signatories to press the issue.[52] The economic incentives are rooted in the high likelihood that implementation of the FCC's proposal would allow the U.S. carriers to obtain INTELSAT capacity at rates below true costs.[53] As The Brattle Group has explained, under Level 3 direct access U.S. carriers would "be entering into capacity contracts with INTELSAT and thus become by far its largest customers."[54] Consequently, even without formal voting rights, these carriers would have negotiating power with INTELSAT management and thus be able to influence privatization "or other restructuring outcomes."[55] U.S. carriers also would "hold considerable sway over foreign signatories because ... they have close business relationships, share ownership of alternative facilities to INTELSAT, and therefore could share with them the gains from

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52 *See* COMSAT Comments, Appendix 3 at 1, 17-19.

53 *See* COMSAT Comments at IV.B.3 & Appendix 3 at 13-17. Proponents of direct access appear to have a very strong interest in receiving below-cost access to INTELSAT for themselves—much as steel consumers in the United States prefer the below-cost price of dumped foreign steel.

54 COMSAT Comments, Appendix 3 at 18.

55 *Id.*

underpaying for COMSAT's past investment."[56] Because of this influence, the U.S. carriers would have sufficient power to steer the outcome of INTELSAT restructuring so that it would not threaten their substantial undersea fiber cable investments—to the detriment of intermodal competition.[57] Thus, direct access calls up the specter that led Congress in 1962 to reject the carrier consortium model for the first U.S. commercial satellite service provider.

In addition, COMSAT notes that commenters favoring INTELSAT direct access make no effort to reconcile their positions with U.S. policy concerning the IGO's spin-off of the privatized New Skies company. These very same commenters insisted that the privatization represented by New Skies must be completed *before* the United States could allow the spun-off satellites to provide service directly to U.S. customers. Yet they apparently see no inconsistency in arguing now that the privatization of INTELSAT may occur after the intergovernmental organization obtains direct access to the U.S. marketplace.

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[56] *Id.*; *see also id.* at 13 (discussing why the lowering of IUCs is largely irrelevant to vertically integrated foreign Signatories). These artificially low rates would not reflect real economic efficiencies. As COMSAT and The Brattle Group have explained, reliance on the IUCs as a substitute for true cost-based rates would create competitive distortions that, in turn, would injure several interests. COMSAT would be hurt by the deprivation of a reasonable opportunity to recover its investment and could even be required by INTELSAT to stand as a guarantor for U.S. direct access customers' obligations. U.S. taxpayers would be hurt because the direct entry of INTELSAT, as a tax-exempt entity, would deprive the U.S. Treasury of tax revenue it would otherwise obtain from COMSAT or another U.S. facilities-based service provider. These other competitors also likely would be hurt because INTELSAT could use its tax-exempt status to establish artificially low rates to attract customers. *See* COMSAT Comments at IV.B.1, 2 & Appendix 3 at 1-8, 11-15.

[57] The Brattle Group noted that the U.S. carriers' push for a skewed privatization would, of course, be couched as wanting the right kind of privatization. However, the opportunity for influence is clear: once given direct access, the U.S. carriers would be INTELSAT's largest customers and their interests would be hard to ignore, regardless of COMSAT's residual position as an equity holder. COMSAT Comments, Appendix 3 at 18.

A few commenters also speculate that allowing Level 3 direct access now would encourage INTELSAT to privatize in the future.[58] They point to the fact that INTELSAT currently authorizes direct access, but they demonstrate no linkage between INTELSAT's access policy and how that promotes privatization. (It is self-evident, rather, that INTELSAT's existing access policies are not a pre-condition to privatization at all.) Nor do these commenters factor into their analyses the role of direct access in introducing competition in other nations versus the already competitive U.S. marketplace. No commenter has offered a persuasive rationale for why allowing Level 3 direct access in the United States at this time would promote privatization.[59] Saying it would be so does not make it so.

V. THE RECORD—AND THE COMMISSION'S OWN RECENT FINDINGS—ATTEST TO THE SERIOUS RISKS THAT ENTRY OF A TAX-EXEMPT INTELSAT WOULD POSE FOR THE COMPETITIVE U.S. INTERNATIONAL MARKETPLACE

A. INTELSAT's Privileges and Immunities Would Afford It an Unfair Advantage in the U.S. Marketplace

The majority of commenters in the present proceeding have downplayed the competitive problems posed by INTELSAT entry into the U.S. marketplace prior to privatization.[60] By focusing exclusively on certain alleged potential savings of the proposed direct access regime (which COMSAT has shown to be minimal at best and illusory at worst),

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[58] *See, e.g.,* Ellipso Comments at 12-13.

[59] Moreover, there is no indication that INTELSAT sees any need to waive any of its privileges and immunities in connection with Level 3 access. *See also infra* Section V.B.

[60] *See, e.g.,* Network Comments at 7-9; AT&T Comments at 11-13; Cable & Wireless Comments at 1-6.

these commenters have entirely overlooked the serious and significant market distortions that—absent full privatization—would necessarily accompany INTELSAT's direct entry into the U.S. international market. Certainly the Commission itself has based many of its past actions on what it perceives to be INTELSAT's "unique characteristics as [a] treaty-based organization[ ] that could enable [it] to distort competition."[61]

COMSAT, however, was intentionally structured by the drafters of the Satellite Act to promote competition. Unlike INTELSAT, COMSAT enjoys no immunity whatsoever from U.S. tax liability.[62] Unlike INTELSAT, COMSAT has at most only limited immunity from U.S. antitrust laws in its Signatory role, where it is subject to U.S. government instructions.[63]

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[61] *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, 12 FCC Rcd 24094, 24148 (1997) (Report and Order) ("*DISCO-II Order*") (including tax-free exemption from income, corporate and property taxes, and customs and other duties in the host countries and other member states); *appeal docketed sub nom., COMSAT v. FCC*, Docket No. 98-1011 (DC Cir. filed Jan. 12, 1998).

[62] *Compare* INTELSAT Agreement 23 U.S.T. 3813, 3855 at Art. XV(b) (1973) ("INTELSAT and its property shall be exempt in all States Party to this Agreement from all national income and direct national property taxation and from customs duties. . . .") *with id.* at 3856 at Art. XV(c) ("all Signatories acting in their capacity as such, *except [COMSAT]*, shall be exempt from national taxation on income earned from INTELSAT in [the United States]") (emphasis added); *see also DISCO-II Order*, 12 FCC Rcd at 24138 ("COMSAT pays taxes. . . ."); *Applications of COMSAT for Authority to Provide Aeronautical Service via the INMARSAT System*, 4 FCC Rcd 7176, 7177 (1989) (computing that COMSAT would pay roughly 36% of its gross aeronautical services income in taxes).

[63] *See Alpha Lyracom Space Communications, Inc. v. COMSAT Corp.*, 946 F.2d 168, 175 (2d Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992) (COMSAT is not immune from antitrust liability for activities undertaken in its capacity as a common carrier providing INTELSAT space segment to U.S. communications carriers).

The lion's share of COMSAT's activities, unlike those of INTELSAT, are directly subject to FCC Title II economic regulation.[64]

Nonetheless, precisely because of COMSAT's limited Signatory immunity, the Commission in the *DISCO-II* proceeding refused to permit COMSAT to provide U.S. domestic satellite services using INTELSAT capacity.[65] Now, in a truly inexplicable turnabout, the *Notice* proposes to allow INTELSAT itself—which enjoys unqualified privileges and immunities—to directly enter the U.S. marketplace as an international service provider. If COMSAT's limited privileges and immunities sufficiently justify a ban on domestic offerings, then it would be irrational to expose the U.S. marketplace to unregulated entry by the fully privileged and tax-exempt IGO here.[66]

Many commenters participating in the present proceeding have contended, both here and in the past, that even when buffered by COMSAT's pro-competitive structure, INTELSAT's participation in the domestic market would cause significant harms to

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[64] *See* 47 U.S.C. § 741 (1994) (COMSAT is "fully subject" to Titles II and III of the Communications Act of 1934, as amended).

[65] *See DISCO-II Order*, 12 FCC Rcd at 24149 ("Because of concern over potential harm to the U.S. market for satellite services, we conclude that [COMSAT's ability to claim limited immunity in its capacity as INTELSAT Signatory] is not a situation that we are willing to extend to the U.S. domestic satellite market."). As a U.S. entity fully subject to domestic taxes and antitrust liability in its commercial service-provider role, COMSAT disagrees strongly with the FCC's conclusion that COMSAT's entry into the domestic market could negatively affect competition and therefore is challenging that decision in court. *COMSAT v. FCC*, Docket No. 98-1011 (DC Cir. filed Jan. 12, 1998).

[66] The distinction between the U.S. domestic market and the U.S. international market obviously cannot justify such contrary approaches—the FCC has determined that the two markets are sufficiently linked to bar COMSAT (and, therefore, INTELSAT) from the domestic market—where COMSAT has a 0% market share—simply on the basis of its

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competition. Accordingly, these commenters have recommended that COMSAT not be allowed to use INTELSAT capacity to offer domestic services until the IGO no longer possesses its treaty-based privileges and immunities. GE Americom, for example, has advised the Commission that "[g]iven the dominant market position of the IGOs now and for the immediate future, it would clearly be premature to consider allowing them expanded access to the U.S. domestic market."[67] Similarly, PanAmSat has "strongly oppose[d]" COMSAT's entry into the domestic market because "INTELSAT's special governmental privileges and immunities give it enormous competitive advantages over U.S. satellite licensees."[68] None of

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presence in the U.S. international market.

[67] Comments of GE Americom, Inc. IB Docket No. 96-111, at 10 (filed July 15, 1996) (filed in the Commission's *DISCO-II* proceeding). Specifically, according to GE Americom, "IGOs have treaty-based privileges and immunities not applicable to other providers of satellite services . . . [that] clearly justif[y] retaining restrictions on their ability to offer services within the U.S." *Id.* at 10-11.

[68] Comments of PanAmSat Corp. IB Docket No. 96-111, at 6 (filed July 15, 1996) (filed in the Commission's *DISCO-II* proceeding), *cited in DISCO-II Order*, 12 FCC Rcd at 24142 n.203; *see also* Comments of AT&T Corp. IB Docket No. 96-111, File No. ISP-92-007, at 14, 15 (filed July 15, 1996) (filed in the Commission's *DISCO-II* proceeding) ("both INTELSAT and INMARSAT are treaty organizations that enjoy a broad range of governmental privileges and immunities (such as freedom from taxation, legal process, and the antitrust laws)" and their participation in "the U.S. domestic market on a primary basis . . . would be detrimental to fair competition"); Comments of Columbia Communications Corp., IB Docket No. 96-111, at 22 (filed July 15, 1996) (filed in the Commission's *DISCO-II* proceeding), *cited in DISCO-II Order*, 12 FCC Rcd at 24148 n.242 (opposing "the use of INTELSAT or Inmarsat facilities for domestic service under any circumstances" because treaty-based organizations enjoy "special privileges—including favored access to orbital locations and the legal immunities from which they now benefit" that could enable them to distort competition).

these parties has attempted to explain how these prior statements can be reconciled with their current position on direct access.[69]

In the present proceeding, Columbia Communications Corp. states that a "significant threat to existing competitors" would be posed by the FCC's tentative proposal.[70] It goes on to state that "[g]iven all that is at stake, and the Government's long-standing attentiveness to issues surrounding US market entry for intergovernmental satellite organizations and their affiliates, Columbia finds it startling that the Commission is now apparently contemplating allowing INTELSAT access to the U.S. market without any commitment, new conditions, or concessions on INTELSAT's part. Such a step would be anathema to basic free market principles."[71]

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[69] Nor has PanAmSat, of course, explained its reversal on the subject of direct access itself. *See, e.g.*, Reply of PanAmSat Corp. filed in *COMSAT Corp. Petition For Forbearance From Dominant Carrier Regulation and For Reclassification as a Non-Dominant Carrier,* File No. 60-SAT-ISP-97, at 2 (filed July 25, 1997) ("even if the FCC had the legal authority to permit direct access to INTELSAT, which it does not, it should not do so because direct access would do violence to the careful structure created by the Satellite Act."); *id.* at 3 ("If COMSAT's exclusive connection to INTELSAT were to be severed by a direct access scheme, it would also sever the only practical link to exercising any regulatory jurisdiction over the INTELSAT system.... A direct access regime would permit a fully immune and privileged INTELSAT to operate at the 'retail' level in the U.S. without any legal or regulatory constraint, thereby compounding immeasurably the risk of anticompetitive conduct for which there would be no remedy.").

[70] Columbia Comments at 4.

[71] *Id.* at 4-6. In addition, Columbia noted that "[a]pproximately 140 countries are members of INTELSAT and each has a Signatory entity with a vested interest in the use of INTELSAT satellite capacity based on its receipt of revenues in proportion to system use in the Signatory's country. *Unlike COMSAT, the U.S. Signatory, which is a publicly traded company subject to substantial government regulation*, most of these other Signatory entities are government-affiliated carriers that are themselves national regulatory entities. Thus these entities have the monetary incentive and the regulatory power to deny market access to

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While not agreeing in full with Columbia's description of INTELSAT, COMSAT nonetheless concurs that INTELSAT's potential entry into the U.S. marketplace through "direct access" prior to privatization could have serious market-distorting and anti-competitive effects. Accordingly, COMSAT agrees in principle that INTELSAT should not be authorized to directly serve U.S. customers while it still retains treaty-based privileges and immunities, such as exemption from U.S. taxation.[72] But COMSAT notes that there exists no practical mechanism for allowing Level 3 direct access without thereby authorizing—explicitly or implicitly—INTELSAT's direct entry into the U.S. telecommunications marketplace.[73] As discussed in the next section, the FCC lacks power to regulate the IGO in its current organizational form.

B. INTELSAT Has Not Expressed Any Willingness to Waive Its Privileges and Immunities If Granted Level 3 Direct Access

Several commenters have called for INTELSAT to explicitly waive its privileges and immunities before the Commission authorizes direct entry of INTELSAT into the U.S.

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companies that compete with INTELSAT." *Id.* (emphasis added).

[72] *Accord id* at 8; GE Americom Comments at 13-14 ("permitting INTELSAT access to the U.S. domestic market before privatization reform takes place will give INTELSAT an undue competitive advantage in the marketplace for such services and irreparably harm competitive carriers"); PanAmSat Comments at 7 (Because "INTELSAT's privileges and immunities benefit it unfairly *vis-à-vis* competing satellite providers, ... direct access for an immune INTELSAT would be problematic.").

[73] One of COMSAT's most persistent critics apparently agrees with this observation, notwithstanding its newfound "support" for direct access. *See* PanAmSat Comments at 7 (assuming that the Commission's proposed Level 3 direct access regime would allow "INTELSAT to provide service directly to U.S. customers," and warning that in doing so,
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marketplace.[74] Others suggest that the FCC must attempt to require INTELSAT to submit to full U.S. common carrier regulation, including filing tariffs with the agency and subjecting itself to the Section 208 complaint process.[75] None of these commenters, however, explains what the FCC should do in the event that INTELSAT does not "voluntarily" offer such a waiver or submit to U.S. regulatory control.[76] Their silence is telling.

Some commenters have suggested that the Commission could exert sufficient indirect control over INTELSAT to protect the public interest simply by regulating the U.S. earth station licensees that would purchase space segment from INTELSAT.[77] This is no remedy. INTELSAT's privileges and immunities stem directly from the INTELSAT Agreement, an

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INTELSAT "must not be allowed to take advantage of its status as an intergovernmental organization").

74 Ellipso Comments at 11; PanAmSat Comments at 7-8.

75 *See, e.g.*, Columbia Comments at 7-8 ("In the event that the Commission ... proceeds to permit INTELSAT to obtain U.S. market access, it should, at a minimum, require INTELSAT to execute a full waiver of its privileges and immunities concurrent with any agreements to sell space segment directly to any user for service to or from the United States. Specifically, INTELSAT would be required to waive its immunity from lawsuits filed in U.S. courts as well as its exemption from all local, state and federal taxation, including taxes on its assets and on its revenues earned in the U.S. market."); Ellipso Comments at 11 ("the Commission should exert its influence to encourage INTELSAT to waive its privileges and immunities relative to services offered in the United States via direct access"); *cf.* PanAmSat Comments at 7-8 ("[T]he Commission should . . . declare that INTELSAT has no immunity from legal process or regulation in this country. Moreover, as a condition on its entry into the 'retail' market in the United States, INTELSAT should have to acknowledge that such immunity is lacking.").

76 *See, e.g.*, PanAmSat Comments at 8.

77 *See, e.g.*, MCI WorldCom Comments at 21-22.

instrument of international law.[78] The FCC has no authority to abrogate these privileges and immunities directly.[79] Further, the FCC has no authority to achieve through indirection what it may not do directly.[80] Accordingly, the Commission lacks authority to remove INTELSAT's treaty-derived privileges and immunities—regardless of the method it might attempt.

C. Recent Amendments to the Foreign Corrupt Practices Act Do Not Give the Commission Authority to Make Any Declaration Whatsoever Regarding INTELSAT's Privileges and Immunities

Recognizing the problems potentially inherent in allowing INTELSAT to provide space segment directly to U.S. customers, PanAmSat urges the Commission to "rely on" the recent amendments to the Foreign Corrupt Practices Act ("FCPA") to "declare that Intelsat has no

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[78] *See* INTELSAT Agreement, 23 U.S.T. at 3855-56 Art. XV.

[79] *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (the power to abrogate an International Agreement is an exercise of the Foreign Affairs power that is vested exclusively in the President); *cf. Goldwater v. Carter*, 444 U.S. 996 (1979) (declining to resolve whether the power to abrogate international agreement may be exercised unilaterally by the President or must be exercised by the President with the advice and consent of the Senate).

[80] *See, e.g., Iowa Utils. Bd. v. FCC*, 135 F.3d 535, 538 (8th Cir. 1998), *petition for cert. filed*, No. 97-1519 (U.S. Mar. 13, 1998) (where FCC cannot impose rules directly, it may not seek to do so indirectly by conditioning the issuance of mandatory certificates upon applicants' "voluntary" agreement to abide by prohibited rules). This case was a separate proceeding from the case of the same name reported at 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, No. 97-826, 1999 WL 24568 (U.S. Jan. 25, 1999). *See also Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478, 1482 (D.C. Cir. 1992) (where FCC must comply with formal procedures of 47 U.S.C. § 204 or § 208 before ordering retroactive rate refund, it cannot use less stringent procedures of 47 U.S.C. § 205 to indirectly achieve the same result without adhering to required formalities).

immunity from legal process or regulation in this country."[81] On the contrary, the recent FCPA amendments confer the FCC with no jurisdiction to make any ruling with respect to INTELSAT's privileges and immunities, and therefore have no bearing on this proceeding.

Section 5(c) of the FCPA provides:

> Except as required by international agreements to which the United States is a party, an international organization providing commercial communications services, its officials and employees, and its records shall not be accorded immunity from suit or legal process ... in connection with such organization's capacity as a provider, directly or indirectly, of commercial telecommunications services to, from, or within the United States.[82]

Subsection 5(d)(2) provides the President the sole authority to determine which agreements entered into by the United States constitute "international agreements" for purposes of this section.[83] The Commission has no role in this process. Indeed, Congress specifically rejected prior versions of the FCPA amendments that would have given the FCC a role in this policy area.[84]

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[81] PanAmSat Comments at 7; International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998). Ellipso makes the same error: "Section 5(c) makes clear that INTELSAT will not enjoy immunity for acts taken in connection with commercial telecommunications activities." Ellipso Comments at 12. *See also* MCI WorldCom Comments at 22-23. On the contrary, INTELSAT will continue to enjoy immunity for such acts to the extent required by international agreements to which the United States is a party.

[82] Pub. L. 105-366, § 5(c).

[83] Pub. L. 105-366, § 5(d)(2).

[84] *Compare* Pub. L. No. 105-366, § 5(d)(2) ("the President shall designate...") *with* H.R. 4353, 105th Cong. § 5(d) (1998) ("the President and the Federal Communications Commission shall...").

Moreover, PanAmSat and Ellipso appear to read far more into the FCPA amendments than is appropriate. Under the express terms of Section 5(c) of the FCPA, INTELSAT will continue to enjoy privileges and immunities—even when providing commercial telecommunications services directly to U.S. customers—to the extent "required by international agreements to which the United States is a party."[85] Thus, it is incorrect to assert that INTELSAT's privileges and immunities would vanish automatically once it began to make space segment available directly to U.S. customers.[86]

In those remaining instances where the U.S. is required under an international agreement to accord INTELSAT with a particular privilege or immunity, Congress directed the President (*not* the FCC) to "take all appropriate actions necessary to eliminate or substantially reduce all privileges and immunities" not eliminated by subsection 5(c).[87] In doing so, the President must act "in a manner that is consistent with requirements" in

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[85] Pub. L. 105-336, § 5(c).

[86] PanAmSat's assertion that "[t]here is no international agreement that gives Intelsat immunity for its commercial activities" is simply a meaningless *ipse dixit*. PanAmSat Comments at 8. In a colloquy on the bill that was ultimately enacted as the International Anti-Bribery and Fair Competition Act of 1998, Senator Conrad Burns (R-MT), the sponsor of the bill and the chairman of the Senate Telecommunications Subcommittee, clearly rejected the interpretation of the bill now urged by PanAmSat. Specifically, Sen. Burns stated that the Senate would accept the provisions of the bill concerning INTELSAT and Inmarsat *only* "because of [the Senate's] understanding that nothing in the bill will change the immunities treatment of INTELSAT and Inmarsat, nor create an inconsistency with U.S. obligations under international agreements...." Colloquy on S. 2375, 144 Cong. Rec. S12,973-03, S12,974 (daily ed. Oct. 21, 1998) (statement of Sen. Burns). In the same colloquy, Sen. Burns stated his "specific view[]" that "[n]othing in the statute changes the immunity standards of [the INTELSAT Headquarters] Agreement." Further, as noted above, Congress made it clear that the President, not PanAmSat, has the authority to decide what international agreements apply to organizations such as INTELSAT. *See id.*

international agreements.[88] It should be obvious that unilateral declarations by the Commission would not be "consistent" with international agreements.

Finally, PanAmSat incorrectly implies that the FCPA confers the FCC with *regulatory* jurisdiction over INTELSAT's business if it were to provide space segment directly to U.S. customers. In fact, the FCPA amendments relate solely to the issue of immunity from suit and legal process. They do not purport to confer the agency with regulatory jurisdiction or to require international organizations to submit to the regulatory jurisdiction of U.S. administrative agencies.

VI. COMMENTERS OFFER NO SOUND ECONOMIC OR POLICY JUSTIFICATIONS FOR REVERSING PRIOR COMMISSION PRECEDENT THAT DIRECT ACCESS TO INTELSAT WOULD BE CONTRARY TO THE PUBLIC INTEREST

In contrast to COMSAT's detailed and comprehensive analysis of the relevant economic and policy issues, most of the other commenters in this proceeding have done little more than parrot the public interest contentions recited in the Commission's *Notice*. Various commenters apply inflammatory—and factually inaccurate—labels to describe COMSAT's role in a global telecommunications marketplace that the Commission already has determined to be substantially competitive.[89] Some also mischaracterize the U.S. as a "laggard" compared to

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87 Pub. L. No. 105-366, § 5(d)(1).

88 Pub. L. No. 105-366, § 5(d)(1).

89 Most of the parties that favor direct access make liberal use of the word "monopoly" even though this word, both as a *de facto* and a *de jure* matter, is wildly inaccurate with respect to COMSAT's market power in the international marketplace. *See, e.g.,* Ellipso

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those foreign nations that have implemented some form of direct access.[90] These commenters fail to note that many of these countries have used some variation of direct access to introduce into their national telecommunications markets the kind of competition that was achieved long ago in the United States.

A. Commenters Provide No Relevant Facts Here to Support Reversal of the FCC's Previous Determination

COMSAT already has shown that virtually all of the Commission's findings in the 1984 direct access proceeding—which led the agency to determine that direct access would not be in the public interest—remain true and relevant today.[91] Indeed, given the threat posed by direct access to current U.S. goals for fully privatizing INTELSAT, the agency has even stronger reason to adhere to its 1984 decision. Furthermore, any possible benefits that might

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Comments at 9; AT&T Comments at 11; MCI WorldCom Comments at 11. The Commission's own findings confirm that COMSAT today wields no market power in the vast majority of the markets it serves. *Non-Dominance Order*, 13 FCC Rcd 14083. The "physical monopoly" that COMSAT might once have had by virtue of providing services via the world's first commercial satellite system disappeared long ago. *See* COMSAT Comments, Appendix 1 at 17.

On what it perceives to be a related point, ICG Satellite Services argues that approval of the merger of COMSAT and Lockheed Martin should be conditioned on the implementation of direct access. *See* ICG Comments at 3-5. In support of its argument, ICG contends that without direct access, the merger would give Lockheed Martin special access to INTELSAT capacity, thereby giving it an unfair competitive advantage over other satellite users. This argument is entirely unfounded. Regardless of the proposed merger, COMSAT will retain its statutory obligation to insure that all carriers have nondiscriminatory access to the satellite system and satellite terminal stations. 47 U.S.C. § 721(c)(2).

[90] Loral Comments at 7; *see also* Cable & Wireless Comments at 2-3; BT North America Comments at 3-8.

[91] COMSAT Comments at IV.A & Appendix 3 at 13.

accrue under a direct access regime will be short-lived; privatization will render moot the concept of direct access as a "remedy" for COMSAT's exclusive Signatory access.[92]

The comments of other parties do not provide a basis for reversing the agency's 1984 decision. Certain discrete arguments are discussed in the subsections that follow, but a few preliminary points can be addressed here.[93] First, a few commenters contend that the Commission has never before confronted the issue of "Level 3" direct access—or make the related argument that INTELSAT's acceptance of various direct access alternatives is a significant alteration of the competitive landscape since 1984.[94] For example, MCI WorldCom

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[92] COMSAT Comments at IV.B.5 & Appendix 3 at 46-48. By contrast, any benefits would have endured for a longer period if direct access had been implemented in 1984 because, at that time, it was expected that the IGO structure would persist indefinitely.

[93] With respect to comments that INTELSAT offers some services that COMSAT does not, *see, e.g.*, Cable & Wireless Comments at 2, COMSAT notes that it also offers to U.S. customers many service options that the IGO does not. Where COMSAT does not offer an INTELSAT service, it is either because there is no demand for it or because it does not fit into a commercially rational array of services. COMSAT responds to customer requests; INTELSAT is a cooperative that offers wholesale space segment capacity to its owners, the Signatories, who in turn deal with actual user requirements.

In addition, several parties suggest that allowing INTELSAT to serve the U.S. market directly would result in services that are better tailored to individual customer needs or in more timely responses to customer inquiries. *See* Cable & Wireless Comments at 2-3; Ellipso Comments at 6-7; GE Americom Comments at 7-8. However, commenters offer no evidence to substantiate these claims. More importantly, Congress has decided the issue: The legislative history of the Satellite Act makes it abundantly clear that lawmakers specifically determined that private companies were equipped to provide better and more efficient satellite service than government (or intergovernmental) entities. *See* COMSAT Comments at I.A. The FCC is therefore powerless to alter this legislative policy determination.

[94] *See* GE Americom Comments at 10; Loral Comments at 3; Sprint Comments at 8-9.

states that INTELSAT's provisions for direct access represent a "critical change" because "the Commission no longer must use artificial structures to implement direct access."[95]

These commenters are simply wrong. The FCC analyzed and rejected the concept of Level 3 direct access fifteen years ago when the notion was tagged as the "capital lease" option.[96] Apart from the name change, the capital lease concept is functionally equivalent to Level 3 direct access: it called for COMSAT to continue to make all capital investments in INTELSAT while space segment capacity would be made available to customers on an "IUC-pass-through" basis.[97] A ministerial fee was to be paid to COMSAT to cover Signatory and maintenance costs,[98] and customers were to be responsible for obtaining their own ground segment.[99] The record contains nothing to demonstrate how this concept differs in any material way from the option known as Level 3 direct access. Similarly, the fact that

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[95] MCI WorldCom Comments at 10. MCI WorldCom further argues that in 1984 the Commission did not have experience to draw from in order to determine what the real cost savings of direct access would be, and that given the implementation of formal direct access programs by INTELSAT, "speculation" as to such cost savings is no longer necessary. *Id.* Yet MCI never quantified what it expects to save, and it declined the Commission's invitation to explain how the company intends to "flow through" these savings to end users.

[96] Loral's contention that in the 1984 proceeding the Commission "considered only Level 4-type direct access" is simply incorrect. Loral Comments at 3. While the Commission did consider an option, termed the "IRU option," which was similar to Level 4 direct access, it also considered a "capital lease" option, which corresponds to Level 3 direct access.

[97] *1984 Regulatory Policies Concerning Direct Access to INTELSAT,* 97 F.C.C.2d 296, 300 (1984) (Report and Order) (*"1984 Order"*). Essentially, the economics of this option were tantamount to a direct contractual relationship between INTELSAT and U.S. customers.

[98] Similarly, the *Notice* contemplates allowing COMSAT to recover expenses in a similar manner. *Notice* at ¶ 47.

[99] *1984 Order* at 300.

INTELSAT now has recognized "structures" for direct access cannot, as a logical matter, be a relevant change—because the Commission did not deem the *absence* of such "structures" to be relevant in 1984.

Aside from INTELSAT privatization, there has been only one material change in circumstances over the past fifteen years, and most commenters recognize it: the abundant and rapidly growing number of facilities-based alternatives to COMSAT and INTELSAT for international transmission capacity. [100] As the FCC is well aware, there has been a veritable explosion in the deployment of international communications transmission facilities during the last decade which—in conjunction with the customers' ability to pursue attractive service options—has resulted in lower prices and increased service options across the board. [101] Under these circumstances, COMSAT's exclusive right to sell INTELSAT capacity—that is, the space segment that it owns—gives the corporation no more market power than, for example, PanAmSat derives from its exclusive right to sell capacity on the space segment that it owns.

The Commission already has determined that COMSAT lacks market power for the vast majority of its INTELSAT offerings, and no entity challenged or appealed that order. By definition, classification as a non-dominant carrier means that COMSAT is unable to set prices

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[100] *See* Loral Comments at 3; MCI WorldCom Comments at 11; PanAmSat Comments at 5; Sprint Comments at 8.

[101] Indeed, in the COMSAT *Non-Dominance Order*—which shares the same docket number with this proceeding—the Commission cites evidence regarding the competitive state of the telecommunications marketplace dating back as far as the late 1980s. *Non-Dominance Order*, 13 FCC Rcd at 14091-92. *See also, e.g., Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18073-80 (1998).

above competitive levels.[102] Logically, then, Level 3 direct access is not needed to promote price competition; the FCC already has determined that COMSAT's rates are market-driven.[103]

These facts, together with the conclusions drawn from the Commission's own previous findings, undercut commenters' policy arguments for direct access. COMSAT's exclusive right to sell INTELSAT space segment in the United States simply does not give COMSAT a corresponding ability to charge "monopoly rents" in a marketplace filled with competitive alternatives.[104] The Commission already has rejected that notion, and market condition confirms it. If COMSAT tried to charge inflated, above-market rates, its customers could and would go elsewhere for service.

Far from undermining the Commission's prior findings on the state of competition in the international facilities-based marketplace, the record now before the agency confirm those determinations and reveals that they virtually eliminate any economic basis for direct access. In particular, the record reflects that U.S. customers can and do choose Teleglobe as an alternative to COMSAT for INTELSAT-based services to up to 240 countries, including

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[102] As noted *infra* note 105 with respect to traffic on the so-called "thin routes," COMSAT has consistently demonstrated that its rates on the small (and shrinking) number of these routes is priced identically to COMSAT's thick route traffic—in other words, *all* of COMSAT's customers pay competitive "transaction-based" rates. *See also, e.g.,* COMSAT Comments at IV.A.4.

[103] Of course, some commenters, would like to obtain below-cost prices—and COMSAT has demonstrated that the Commission's proposal could, in the absence of an appropriate surcharge, result in the provision of INTELSAT capacity at such confiscatory levels. *See* COMSAT Comments at V & Appendix 3 at 22.

[104] Consequently, the Commission should dismiss as facetious factually unsupported allegations to the effect that COMSAT is a "monopolist" that can "charg[e] inflated prices that maximize its profits." MCI WorldCom Comments at 12.

essentially all of the so-called "thin routes."[105] Consequently, the current state of the marketplace shows that there is no need to mandate Level 3 direct access even on those routes for which COMSAT's regulatory classification has not yet been updated.

B. Nothing Drawn from the Implementation of Direct Access in Foreign Countries Is Relevant in the U.S. International Market, Which Is Characterized by Substantial Facilities-Based Competition

Several commenters attempt to draw parallels between the experience under direct access regimes in other countries and their predictions for what Level 3 direct access would

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[105] *See* Cable & Wireless Comments at 3; Loral Comments at 6. Even without competition from Teleglobe on these thin routes, COMSAT's customers there currently receive the full benefit of market-based rates, because COMSAT's rates are uniform across all geographic routes—thick and thin alike. COMSAT Comments at IV.A.4. Moreover, COMSAT has committed to reduce thin route rates even further under its incentive-based pricing proposal, which remains pending before the agency. *See* Comments of COMSAT Corp., *Policies and Rules for Alternative Incentive-Based Regulation of COMSAT Corporation*, IB Docket No. 98-60, at 2, 4 (filed May 29, 1998) (requesting Commission approval to decrease digital switched voice services on "thin routes" by 4% per annum for five years—and noting that these markets accounted for only about 8% of COMSAT's revenue from INTELSAT services in 1998).

Furthermore, in today's highly competitive environment, it appears that the few routes still deemed "non-competitive" remain that way because no carrier has desired to match COMSAT's *de facto* competitive rates on these routes. This point is underscored by the comments submitted in this proceeding by IT&E, which serves remote regions of the Western Pacific, including Guam. According to IT&E, the company "has been unable to obtain a non-INTELSAT source of space segment capacity. The most promising source of potential separate system capacity—a proposal from PanAmSat to furnish an 'Oceana Beam' on its POR satellite (PAS-2)—*was abandoned by PanAmSat in 1994.*" IT&E Comments at 1-2 (emphasis added) (noting that PanAmSat later offered an alternative that would result in a cost to IT&E above that charged by COMSAT).

mean here.[106] COMSAT already has demonstrated that experience abroad provides little if any predictive value with regard to direct access in the United States.[107]

To reiterate briefly, direct access in other countries has been used by policymakers there as one means of fostering competition where no facilities-based alternatives to the national PTT exist for international transmission capacity.[108] Absent the Satellite Act, that situation is analogous to what would have developed in the United States. Lawmakers here created COMSAT 37 years ago as an independent "carrier's carrier" specifically to avoid the types of bottleneck problems that foreign telecom policymakers are now trying to remedy. Thus, far from being a "laggard" as one commenter contends,[109] the United States has always enjoyed the competitive access to international facilities for which most so-called "progressive" nations still yearn.[110]

Analogies are certainly flawed with respect to the United States and the United Kingdom, despite the efforts of some commenters to compare the two.[111] COMSAT is

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106 *See, e.g.,* GE Americom Comments at 2.

107 COMSAT Comments at IV.C.

108 Several commenters repeat the statement in the *Notice* that COMSAT itself is a direct access customer in Britain and Argentina. As COMSAT already has noted here and in its initial comments, competitive conditions are dramatically different in the United Kingdom. As for Argentina, the INTELSAT Signatory there is that country's telecommunications regulatory authority, which is not a service provider. There is no other way to obtain INTELSAT space segment in Argentina except through direct access. *See* Comments at IV.C, n.217.

109 Network Comments at 8.

110 Loral Comments at 7.

111 *See, e.g.,* Sprint Comments at 9; BT North America Comments at 3-8; Cable & (Continued...)

primarily an independent supplier of space segment to U.S. carriers and users—and not a provider of "retail" services to end users. In contrast, the United Kingdom's Signatory, British Telecom ("BT"), primarily uses INTELSAT capacity as an input for providing its retail customers with international telecommunications services. BT enjoyed a *de jure* monopoly on switched telephone service until the early 1980s, and had duopoly control, with Mercury Communications, of all international communications until 1996. Then and now, BT also owned and operated both undersea cables and gateway earth stations linking INTELSAT to BT's terrestrial public domestic and international network. These facts demonstrate why direct access to INTELSAT is not an important issue for BT.[112] Put simply, selling INTELSAT access is only a minor part of BT's business; but is COMSAT's *entire* INTELSAT business.

VII. THE RECORD DOES NOT SUPPORT THE CLAIM THAT COMSAT RECOVERS SUPRA-COMPETITIVE RETURNS

Contrary to inflammatory—and flatly incorrect—assertions by ill-informed commenters that COMSAT extracts "monopoly rents" and enjoys a "68% mark-up," the record shows that COMSAT does not charge a supra-competitive mark-up over the true costs of providing service. Nor does COMSAT earns a supra-competitive return on its INTELSAT investment. The mere repetition of such false claims by commenters does not make them true.

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Wireless Comments at 2-3.

[112] As of September 1997, BT had 77% of the market for national (domestic long distance) calls, 87% of the market for local calls, and supplied 89% of the exchange lines in the U.K. For outgoing calls from the U.K., BT had 52% of the market for financial year 1997. *See* British Telecom, *1998 Annual Report and Accounts* at 16 (1998) (also available at (visited Jan.
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A. Commenters' Claim of a "68% Mark-up" Are Misleading

As COMSAT anticipated, the initial comments of other parties to this proceeding reveal widespread confusion about the nature of the INTELSAT Utilization Charges ("IUCs") and how they factor into COMSAT's pricing of its services.[113] The confusion apparently runs in contradictory directions; one commenter complains that COMSAT's rates may be *too low* due to IUC return levels, while others contend that COMSAT's rate are set *too high* above the IUCs.[114] The truth of the matter is that COMSAT's tariff rates are set to recover its costs and attain profit margins commensurate with a competitive market.

The IUCs—and there are many more than one—are not the true "cost" or "price" of INTELSAT space segment service to Signatories, as the FCC itself has previously recognized.[115] For that reason, the repetitive plaint by many commenters about COMSAT's allegedly excessive 68% mark-up is factually indefensible.[116]

COMSAT already has demonstrated that the much-referenced 68% figure represents only the difference in 1996 between (1) total IUC payments associated with COMSAT's space

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29. 1999) <http://www.bt.com/world/corpfin/shareholder/>).

[113] COMSAT Comments at IV.B.2.

[114] *Compare* BT North America Comments at 17 (arguing that COMSAT could use its return to underprice U.S. rivals) *with* Network Comments at 9-11; Cable & Wireless Comments at 5 (contending that COMSAT rates are supracompetitive).

[115] *See* COMSAT Comments at IV.B.2 & Appendix 3 at 22-26 (IUCs are accounting mechanisms that do not include many true costs that a commercial private entity would reflect in its charges).

[116] *See* AT&T Comments at 11-12; Cable & Wireless Comments at 2; GE Americom Comments at 8; Loral Comments at 5; MCI WorldCom Comments at 12; PanAmSat
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segment services and (2) COMSAT's total INTELSAT-related revenues for that year. As the Brattle Group explained in its analysis appended to COMSAT's initial comments:

> the IUC differential is a meaningless number: it is the difference between two essentially unrelated measures. This difference *does not* represent the difference between COMSAT's cost of its space segment and the rate charged to COMSAT's customers. Because COMSAT owns INTELSAT space segment and does not "buy" it from INTELSAT at the IUC, the difference *does not* represent a "resale margin" or "resale markup." The difference *does not* even represent commonly used financial ratios, such as the "earnings before taxes, depreciation, and amortization" margin (EBITDA margin). Finally, this difference *certainly does not* represent COMSAT's "profit margin," much less a "monopoly profit."[117]

Therefore, the Commission must reject the contention that a simplistic comparison of the rates charged by COMSAT with the relevant IUCs is evidence that COMSAT extracts "monopoly" rents from its customers. Indeed, because this oft-cited percentage results from a comparison of two essentially unrelated numbers, it is not surprising that it changes significantly from year to year. In 1997, this average difference was only 52.5%.

There is nothing new about these facts. The National Economic Council also has explained that the term "mark-up" is "misleading" and should not be used because IUCs do not reflect all of COMSAT's costs.[118] The FCC itself has stressed that the alleged 68% "mark-up" calculation is not a useful indicator for measuring COMSAT's profit margins.[119]

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Comments at 6; Sprint Comments at 6.

[117] COMSAT Comments, Appendix 3 at 42.

[118] Administration Response to Rep. Thomas Bliley (R-VA), Chairman, House Telecommunications Subcommittee, Jan. 23, 1998, at 11-12 (responding to Question No. 15) ("Administration Response to Chairman Bliley").

[119] FCC Response to Rep. Thomas Bliley (R-VA), Chairman, House Telecommunications (Continued...)

Nor does it have anything to do with COMSAT's tariff rates—which are based on costs as required by FCC regulation.

As COMSAT's initial filing in this proceeding demonstrated, the oft-cited percentage is an incorrect measure because COMSAT incurs significant—and well-recognized—costs that are not reflected in the IUCs. These costs include corporate tax liabilities associated with its INTELSAT investment obligation, direct costs incurred in performing its statutorily required Signatory functions on behalf of all users, and other costs associated with COMSAT's investment and operating liabilities. The latter include "top off" insurance for satellite asset values that INTELSAT does not insure itself.[120] Consequently, it is factually incorrect to regard the differences between COMSAT's prices and the relevant IUC as a true "margin" or "mark-up" in the normal business sense of the term.[121]

Indeed, the notion that COMSAT somehow earns "monopoly" profits from its exclusive franchise for INTELSAT space segment simply cannot be reconciled with the Commission's recent determination in the *Non-Dominance Order* that COMSAT has no power

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Subcommittee, Dec. 22, 1997, at 10 (responding to Question No. 15).

[120] *Id.* BT North America notes that BT "does not incur what COMSAT has described as the costs of satellite launch and insurance." BT North America Comments at 5. The reasons why BT, unlike COMSAT, does not need to purchase "top off" insurance is logical: First, BT's investment share in INTELSAT is only about one-third that of COMSAT, and second—and more important—BT dwarfs COMSAT in size. Consequently, the bankruptcy risk that BT faces as a result of failed launches is negligible compared to the risk facing COMSAT. (For example, absent this insurance, COMSAT's share of losses that occurred as a result of INTELSAT's 1996 launch failure would have been three times as high as that of BT.) Because bankruptcy is an event that consumes real resources and hence reduces a firm's value, it makes sense to try to reduce its probability of occurring. Thus, COMSAT's investment in insurance makes sense for risks that, to BT, are relatively small.

to charge supra-competitive rates. Furthermore, The Brattle Group's factual analysis demonstrates that COMSAT earns low margins compared to other international telecommunications providers. Indeed, COMSAT's EBITDA margin is approximately the same as that of PanAmSat, and the two companies' revenues and costs prior to PanAmSat's acquisition by Hughes were essentially similar. "In short, there is nothing unusual about COMSAT's revenues, costs, or margin."[122]

Because the comparison of COMSAT's INTELSAT-related revenues to the IUCs does not correctly show the true costs to COMSAT of providing its space segment services, that comparison provides no basis for concluding that allowing Level 3 direct access at IUC levels would result in economic cost savings.[123]

Instead, Level 3 direct access—absent a compensatory Signatory surcharge—would give the large U.S. carriers the ability to obtain INTELSAT capacity at rates below the true cost of service.[124] That commenters might want this result is unsurprising: The Brattle

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[121] COMSAT Comments at IV.B.2 & Appendix 3 at 13-14.

[122] *Id.*

[123] *See* COMSAT Comments, Appendix 3, Attachment 1 (Professor Hendrik S. Houthakker, Harvard University; Professor Marius Schwartz, Georgetown University; Johannes P. Pfeifenberger, William B. Tye & M. Alexis Maniatis, The Brattle Group, *Joint Response to the Satellite Users' Coalition "Analysis of the Privatization of the Intergovernmental Satellite Organizations as Proposed in H.R. 1872 and S. 1382,"* 11-15 (dated March 9, 1998) ("Analysis of SUC Study")) (explaining that the SUC Study's "analyses [are] fraught with misconceptions, errors, and double counting" and demonstrating that, using corrected figures, the alleged savings would be zero under the SUC Study's own methodology).

[124] COMSAT Comments at IV.B.2 & Appendix 3 at 13-15.